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Supreme Court, U.S.
FILED

NO. 93 1375 FEB 2 1994

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IN THE
SUPREME COURT OF THE UNITED STATES
October TERM, 1994

ALAN GOLDSTEIN, Petitioner

vs.

THE UNITED STATES, Defendant
and J. NEVIN WHITE LUMBER COMPANY
and CHICAGO TITLE INSURANCE COMPANY
OF MARYLAND, Third Party Defendants,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an owner of land, purchased at a County tax sale which was defective for lack of adequate notice to the pre-tax sale owner, nevertheless hold an inviolate title where the former owner has failed to judicially challenge the sale within the period of the applicable state statute of limitations?

2. Under the foregoing conditions and where the federal government takes such land by condemnation, is the tax sale purchaser entitled to compensation pursuant to the Constitution of the United States?

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IN THE SUPREME COURT OF THE UNITED STATES

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ALAN GOLDSTEIN, Petitioner

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Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

Alan Goldstein, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled case on November 10, 1993.

OPINIONS BELOW

The October 10, 1993 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed is unreported (Case #93-5116) and is reprinted in the separate Appendix to this Petition, p. 12. The prior opinion of the United States Court of Federal Claims entered February 24, 1993 is

unreported (Case #270-89L), and is reprinted in the separate appendix to this Petition, p.p. 14 through 35, inclusive.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> ". . . nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

On October 13, 1964, the Tax Claim Bureau of Dauphin County, Pennsylvania (TCB) sold a tract of unimproved land (194.997 acres) to one Coleman. The sale was confirmed by the County Court and the deed issued to Coleman. Upon Coleman's failure to pay his real estate taxes, the land was again sold in 1985 to Petitioner, Goldstein. In the absence of

any objections being filed per the Pennsylvania law, this sale was confirmed by the same County Court and the deed issued to Goldstein.

The tax sale to Coleman was defective in that the J. Nevin White Lumber Company's (White) predecessor in title was not notified as required by Pennsylvania law. On June 20, 1986, the United States filed a condemnation proceeding relating to 141.6861 acres out of the 194.997 acre tract, said suit being filed in the United States District Court for the Middle District of Pennsylvania, Civil No. CV-86-0840, identifying only White as the owner. The condemnation suit concluded by White being paid by the United States $1,246.59 per acre, which included payment for 141.6861 acres out of the original 194.997 acre tract.[1]

Neither White, nor White's predecessor nor the United States ever acted to judicially question the validity of the 1964 sale to Coleman (and the 1965 deed emanating therefrom) or the 1985 sale to Goldstein (and the 1986 deed emanating therefrom).

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[1]Actually Goldstein's claim is that he is a co-owner of an undivided interest in subject real estate, together with White and a non-party named Johnson.

This is a suit for compensation for the taking of Petitioner's land, brought pursuant to 28 U.S.C. §1491.

REASONS RELIED UPON FOR GRANTING THE WRIT

Although the 1964 tax sale was defective, no one has ever acted to judicially challenge it or the 1985 sale to Goldstein. In 1982, Pennsylvania enacted a six month statute of limitations barring a challenge to a judicial tax sale.[2] Section 25(a) and (b) of the Pennsylvania Judicial Code, Act of July 9, 1979, P.L. 586, No. 142 (as reproduced in the note following 42 Pa. C.S.A. §5522) provides that with respect to any cause of action not barred on the day prior to its effective date, the same may be commenced within one year after its effective date. That the aforesaid §25(a) and (b) were intended to apply to subsequently enacted statutes of limitations is evident by its verbiage and references to statutes of limitations in general,

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[2]Act of December 20, 1982, P.L. 1409, No. 326, Art. II, §201 (effective February 19, 1983); 42 Pa. C.S. §5522(b)(5). In recent times and prior to the 1982 statute, only laches was available to bar a tax sale challenge. In re Tax Claim Bureau, 439 A.2d 1349 (1982).

and thus not limited to statutes of limitations in effect at the time of its 1979 enactment. Therefore, when the six month statute of limitations became effective on February 19, 1983, would-be challengers to the 1964 sale still had one year to initiate their challenge. But that year passed without a challenge, and similarly, that same period elapsed from the time of the 1985 sale to Goldstein, and his 1986 deed therefrom, without any such challenge. Indeed, to this day, there has been no challenge save for the collateral attack on Goldstein's title by the defense of Defendants in the instant litigation.

That the 1964 tax sale to Coleman was a judicial sale, is amply demonstrated by reference to the Pennsylvania statute itself (The Pennsylvania Real Estate Tax Sale Law of July 7, 1947, P.L. 1368, as amended 72 P.S. §5860.101 et seq., which at that time denominated such a sale as a judicial sale in §308(a) thereof.[3]

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[3]A July 10, 1980 amendment to the Real Estate Tax Sale Law, stripped this upset sale of its judicial sale attribute. See appendix, p.p. 28, 29 and 30 for the text of §308(a) as originally enacted, a 1965 amendment, Act of August 26, 1965, P.L. 386, No. 201, §1 (to show its text immediately

The trial court judge granted Defendants' Motion For Summary Judgment because it believed and found that the 1964 sale was not a judicial sale, applying principles of law which generally hold that a judicial sale is one ordered by the Court (and not just confirmed by the Court).[4] In so finding the trial court was apparently not aware of the evolution of §308(a) and its form and verbiage at the time of the 1964 sale.

Inexplicably, the Appeals Court which had the benefit of Goldstein's brief specifically setting forth the various versions and applicable dates of §308(a) simply affirmed the judgment below (in a less than full page opinion) and upon the trial judge's opinion, without even mentioning or discussing §308(a). In actuality, the trial court's judgment and opinion is clearly erroneous and cannot be justified under §308(a), and the Appeals Court's failure to discuss or even mention this matter perpetuates the error and resulting injustice.

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before the 1980 amendment) and the 1980 amendment, Act of July 10, 1980, P.L. 417, No. 98, §3.

[4] In re Acchione, 227 A.2d 816, 823 (Pa. 1967).

To allow the Appeals Court judgment to stand would deprive Goldstein of his property without due compensation. United States vs. Willow River Co., 324 U.S. 499, 502 (1945).

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

YOFFE & YOFFE, P.C.

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DATED: January 26, 1993

APPENDIX

A. JUDGMENT OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
93-5116

ALAN GOLDSTEIN,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee,

v.

J. NEVIN WHITE LUMBER COMPANY,
and
CHICAGO TITLE INSURANCE
COMPANY OF MARYLAND,
Third-Party Defendants

JUDGMENT

ON APPEAL from the United States Court of Federal Claims
in CASE NO(S). 270-89L
This CAUSE having been heard and and considered, it is

ORDERED and ADJUDICATED:

AFFIRMED

ENTERED BY ORDER
OF THE COURT

DATED NOV 10 1993 /s/ Francis X. Gindhart
FRANCIS X. GINDHART, Clerk

B. OPINIONS BELOW

1. November 10, 1993 Opinion of the Court of Appeals for the Federal Circuit

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-5116

ALAN GOLDSTEIN,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee,

v.

J. NEVIN WHITE LUMBER COMPANY,
and
CHICAGO TITLE INSURANCE
COMPANY OF MARYLAND,
Third-Party Defendants

DECIDED: November 10, 1993

BEFORE NIES, Chief Judge, ARCHER and CLEVENGER, Circuit Judges.

CLEVENGER, Circuit Judge.

Alan Goldstein appeals the judgment of the United States Court of Federal Claims* granting the government's motion for summary judgment and dismissing Goldstein's complaint. Goldstein v. United States, No. 270-89L (Feb. 25, 1993) (table).

The Court of Federal Claims held that Goldstein's tax deed to a 141 acre Pennsylvania parcel within a larger tract condemned by the government was void as a matter of Pennsylvania law. Accordingly, without any property interest in the tax tract, Goldstein cannot lay claim to a proportionate amount of the just compensation award made by the government upon its taking of the condemned tract. For the reasons stated in, and upon the basis of, the thorough and correct opinion of the Court of Federal Claims, we affirm its judgment in this case.

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*The United States Claims Court is now known as the United States Court of Federal Claims. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516.

2. February 24, 1993 Opinion of Honorable Wilkes C. Robinson, Judge of the United States Court of Federal Claims

IN THE UNITED STATES CLAIMS COURT

ALAN GOLDSTEIN, Plaintiff	:	
v.	:	Docket No. 270-89 L
UNITED STATES OF AMERICA, Defendant	:	

OPINION

ROBINSON: Judge.

This matter is before the Court upon the parties' cross-motions for summary judgment pursuant to RCFC 56. Plaintiff claims that defendant violated the Fifth Amendment to the Constitution when, as a result of a condemnation proceeding involving a tract of land in Pennsylvania, it took plaintiff's property without compensation. J. Nevin White Lumber Co. (White), identified in the condemnation proceeding as the record owner of the land, and Chicago Title Insurance Co. of Maryland, White's title insurer, are third-party defendants. After careful review of the parties' pleadings and

arguments, the court finds that plaintiff's claim must be denied. The court's reasoning follows.

Factual Background

On June 20, 1986, the Government filed a complaint in condemnation in the United States District Court for the Middle District of Pennsylvania, Civil No. CV-86-0840, for approximately 583.89 acres in Dauphin County, Pennsylvania, identified as "Tract No. 359-01 (J. Nevin White Lumber Company, et al.)" In that proceeding, White was identified as the owner of the land. The Government's condemnation sought title to the property for use as part of the Appalachian National Scenic Trail system, which extends through Dauphin County.

The parties do not contest that White's chain of title to most, if not all, of the property is uninterrupted, and that White has paid all taxes assessed upon the tax tract since acquiring the property from Fred N. Lyons.[1] When the Government

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[1]Thomas Elder conveyed title in 1854 to Lewis Heck. The Estate of Lewis Heck was partitioned and the premises awarded to his daughter Marianne H. Donaldson. In 1896, Donaldson conveyed the premises to J. Lewis Heck. In 1904, J. Lewis Heck conveyed the tract John Creswell, who conveyed the property

condemned the property, White was the only owner of record who was lawfully paying taxes for the tax tract (except possibly for a parcel of approximately 13-19 acres in the tract which may or may not have been devised by one of the intermediate owners).[2]

Defendant paid White $727,500 for the condemned land based upon White's recorded deed to the property. White then sought title insurance from Chicago Title, which failed to discover plaintiff's tax deed.

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to Harvey Creswell in 1906. In 1907, Harvey Creswell conveyed the property to Cora Zimmerman, and Zimmerman conveyed the property to Fay Bailey in 1916. In 1938, Bailey conveyed the tract to G.L. Bendigo, who conveyed it to W.L. Gaugler in 1947. In 1952, Gaugler conveyed the property to P.W. Fetterhoff, and Fetterhoff conveyed the tract to Fred N. Lyons by deed dated January 21, 1965. By deed dated February 15, 1967, Lyons conveyed the tract to J. Nevin White.

[2]The property actually consists of approximately 159 acres. In the conveyance of this property from Thomas Elder to Lewis Heck, and from Lewis Heck to J. Lewis Heck, the property is described as containing either 159 or 153 acres. When J. Lewis Heck conveyed the property in 1904 his deed to Creswell only referred to 140 acres, which is the basis for the theory that a parcel of approximately 19 acres in the tract was never subsequently conveyed by Heck or his heirs. However, examination of records reveals that Creswell owned the entire tax tract because the monument and boundary references in his deed, which describe the boundaries of adjacent property owners, describe a tract of 159 acres, not 140 acres.

Plaintiff maintains, however, that he owns a property interest in approximately 141.6861 acres of the condemned tract, by virtue of a deed dated February 4, 1986, from the Tax Claim Bureau of Dauphin County (Tax Claim Bureau or Bureau).

Plaintiff's chain of title, he alleges, began in 1965 with a tax sale deed issued to Carl Coleman to a parcel described as "Parcel No. 43-3-1" (the tax tract).[3] In the Coleman deed, the Bureau identified "Thomas Elder" as the owner of the tax tract before the conveyance to Coleman in 1965. The parties agree, however, that Thomas Elder did not then own and could not have conveyed his title to the property to anyone in 1965 because he had been dead for many years. In fact, Thomas Elder actually conveyed title to the property in 1854, approximately 111 years before Coleman's acquisition of the tax sale deed. Further, the Dauphin County

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[3]Plaintiff contends that the tax sale deed he received created a new chain of title in him; therefore, he maintains, it is unnecessary and improper to refer to the Coleman deed as part of his "chain of title". The court, however, is convinced that reference to the Coleman deed is imperative to explaining the factual background of this case; although, the precise characterization of the Coleman deed is insignificant to the outcome of this case.

land records evidence that prior to his death, Thomas Elder never reacquired any title to the tax tract.

After obtaining his tax deed, Coleman failed to pay taxes on the property. Subsequently on November 4, 1985, the tax tract was, again, auctioned at a tax delinquency sale. Plaintiff purchased the property for $170.91. On January 27, 1986, the sale was confirmed by Court of Common Pleas of Dauphin County, and, on February 4, 1986, plaintiff was issued a tax deed similar to Coleman's from the Bureau as evidence of his title. The property described in plaintiff's tax sale deed is exactly as that described in Coleman's deed -- "Parcel No. 43-3-1".

Plaintiff admits that he failed to conduct a title search of the tax tract before purchasing it. Indeed, such a search was not conducted until approximately two years after plaintiff's purchase. White notes that it neither received official notice nor actual knowledge or notice of the tax sale to plaintiff prior to the commencement of this action. Furthermore, White had no notice that plaintiff subsequently paid taxes on the tax tract, explaining

why plaintiff was not notified of the condemnation proceeding that resulted in a remittal of the entire just compensation award of $727,500 to White, the record owner of the property.

On March 5, 1991, defendant filed a motion for summary judgment. On April 5, 1991, plaintiff filed a cross-motion for summary judgment.

Contentions of the Parties

Plaintiff claims that the land he purchased in 1985 includes part of the land the Government condemned in 1986.[4] He contends that his tax deed created a new chain of title in him, which is valid and no longer subject to any challenge in Pennsylvania under applicable legal precedents. In this regard, plaintiff admits that White never received the notice of the tax sale required by Pennsylvania Real Estate Tax Law, Act of July 7, 1947, P.L., 1368, as amended PA. STAT. ANN. tit. 72 §§5860.101 - 5860.803 (the Tax Sale Law). Plaintiff contends, however, that the tax sale was not "void" but "voidable," and that White had a period of six

[4]The tax tract consists of approximately 250 acres. The portion of the tax tract condemned by the Government is 141.6861 acres.

months to have the tax sale set aside. Plaintiff therefore concludes that, since the six-month period elapsed without any action by White, the tax sale must be upheld by this court. Plaintiff maintains that this property was taken in violation of the Fifth Amendment, and that he is entitled to an award of $109,053 as his share of the proceeds from the Government's prior condemnation action.

Defendant asserts that both plaintiff's and Coleman's tax deeds are void, not voidable, as a matter of Pennsylvania law, because the Bureau failed to notify the record owner[5] of the tax sale to Coleman and failed to notify White of the tax sale to plaintiff.[6] Defendant also asserts that the tax sale, which was subject to the Tax Sale Law, is distinct from and does not rise to the level of a

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[5]The exact date of the 1965 tax sale to Coleman is not in the record before the court. Depending on this date, either P.W. Fetterhoff or Fred N. Lyons was the record owner of the property.

[6]Pursuant to the Government's third-party complaint, both White and Chicago Title would have liability to defendant if plaintiff were to prevail in the instant case, although Chicago Title's exposure is limited to the face amount of its policy.

"judicial" sale, which would be subject to a six-month statute of limitations.

DISCUSSION

Summary judgment is appropriate when "there is no genuine issue as to any material fact" so that the moving party is "entitled to judgment as a matter of law." RCFC56(c). In evaluating a motion for summary judgment, any doubt as to whether a genuine issue of material facts exists must be resolved in favor of the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Campbell v. United States, 2 Cl. Ct. 247, 249 (1983). A genuine issue of material fact is one that would change the outcome of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-81 (1986).

When the moving party has met its burden, the non-moving party must come forward with specific facts showing that a genuine issue for trial exists, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986), and the non-moving party may not discharge its burden by cryptic, conclusory, or generalized responses. See Willetts v. Ford Motor Co., 583 F.2d 852, 856 (6th Cir.

1978); Tunnell v. Wiley, 514 F.2d 971, 976 (3d Cir. 1975). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968).

The parties are in agreement that there are no genuine material issues in dispute. After reviewing the pleadings and the parties' oral arguments, this court agrees and, therefore, finds that the case is a proper one for disposition upon the parties' pending motions.

The Fifth Amendment to the United States Constitution states, "[No] private property [shall] be taken for public use, without just compensation." It is undisputed that the Government condemned the land at issue for public use. It is also undisputed that defendant has failed to compensate plaintiff for the taking. The central issue in this case, therefore, is whether plaintiff owned an interest in the property when it was condemned by defendant. The court must look to the law of Pennsylvania to resolve this issue. See Board of Regents v. Roth,

408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

The Pennsylvania Tax Sale Law was enacted for dual purposes: first, it protects local governments against delinquent taxpayers who are guilty of willful, persistent, and long-standing tax delinquencies; and, second, it protects the delinquent taxpayer against the deprivation of his property without due process of law. Hess v. Westerwick, 76 A.2d 745, 748 (Pa. 1950); Huhn v. Chester County, 328 A.2d 906, 908 (Pa. Commw. Ct. 1974).

The Tax Sale Law provides that the Bureau must notify delinquent property owners of the tax delinquency and impending tax sale. Initially, the Bureau is required to notify property owners of their tax delinquency by certified mail and give

them at least one year to redeem their property before it is "advertised for and exposed to sale . . . ." PA. STAT. ANN. Tit. 72, § 5860.308(a). Then, the county must alert the owners that the Bureau intends to sell their property at a tax sale by three separate types of notice, as follows: (1) naming them thirty days before the tax sale, in two newspapers of general circulation in the county, thereby informing those owners of the time, place, and purpose of that sale; (2) notifying each owner of record by certified mail, thirty days before the tax sale, of the time, place, and purpose of the sale; and (3) posting a warning on the property, ten days before the tax sale, that the county intends to sell it for delinquent taxes. PA. STAT. Ann. tit. 72, § 5860.602.

In Hess v. Westerwick, the Pennsylvania Supreme Court explained that Bureau compliance with these notice provisions is essential to afford individuals the due process of law guaranteed by the United States and Pennsylvania constitutions. Hess, 76 A.2d at 748. The court stated, "Without due process of law the right of private property cannot be said to exist. . . . '[D]ue process of law'

inhibits the taking of one man's property and giving it to another . . . without notice or any opportunity for a hearing." Id.; see Schroeder v. New York, 371 U.S. 208, 212 (1962 ("The requirement that parties be notified of proceedings affecting their legally protected interests is . . . a vital corollary to one of the most fundamental requisites of due process -- the right to be heard."); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The court added that, since the Tax Sale Law is designed to enhance the validity of tax deeds, state taxing authorities have a responsibility to see that their oversight or neglect does not result in innocent owners being deprived of valuable property. Hess, 76 A.2d at 748.

Thus, the notice provisions of Pennsylvania's Tax Sale Law are construed strictly by the Pennsylvania courts to guard against the deprivation of property without due process of law. In re Exceptions to Sale of Property of Molchan, 503 A.2d 1051, 1054 (Pa. Commw. Ct. 1986). The Bureau must comply with each of the notice provisions to effect a valid tax sale. Daubenspeck Appeal, 411 A.2d 837,

838 (Pa. Commw. Ct. 1980); Casanta v. Clearfield County Tax Claim, 435 A.2d 681, 682 (Pa. Commw. Ct. 1981); Financial Management Professional Corp. v. Tax Claim Bureau, 550 A.2d 601, 603 (Pa. Commw. Ct. 1988). Where any of the forms of notice is missing, "the tax sale is void." Molchan, 503 A.2d at 1054.

Based upon the record before this court, it cannot be disputed that, in 1965, Thomas Elder did not own the tax tract and had not owned the property since his conveyance of title in 1854. The Bureau explicably misidentified him as the owner in 1965 and compounded this error in determining that he had been delinquent. Further, none of the notices required by state law were executed.[7] The Bureau's erroneous assessment of ownership precipitated its failure to adhere to constitutional and state

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[7]The evidence shows that Fred N. Lyons received title to the property from P.W. Fetterhoff by deed dated January 21, 1965. Lyons, in turn, conveyed title to White by deed dated February 15, 1967. Plaintiff does not dispute that neither Fetterhoff nor Lyons, who were the record owners during the period 1963 to 1967, were notified by the County of Dauphin of the tax sale to Coleman. In fact, no one can, now, prove the contrary because Dauphin County's loss of pertinent tax sale records from 1965. The burden of proving compliance with the notice provisions rests on Dauphin County's tax claim bureau. Ali v. Montgomery Co. Tax Claim Bureau, 557 A.2d 35, 36-37 (Pa. Commw. Ct. 1989).

statutory notice requirements and procedures. Thus, the Bureau's conveyance of the property to Coleman at a tax sale was invalid.

Nevertheless, plaintiff contends that the invalidity of the Coleman deed is immaterial, and that a new chain of title came into being once plaintiff paid $170.91 for the property, divesting White of legal title. Plaintiff overlooks, however, the Bureau's constitutional obligation to notify White of the November 1985 tax sale. See Teslovich v. Johnson, 406 A.2d 1374, 1378 (Pa. 1979). White received no notice of the tax sale pursuant to state law.[8] All of the Bureau's actions and notices (the

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[8]As the purchaser at tax sale who is attempting to uphold the validity of that sale, plaintiff has the burden of proving compliance with the notice provisions of state law. Dolphin Serv. Corp. v. Montgomery County Tax Claim Bureau, 557 A.2d 38, 39 (Pa. Commw. Ct. 1989), appeal denied, 575 A.2d 117 (Pa.), and appeal denied sub. nom. In re 850 Modena St., Inc., 575 A.2d 118 (Pa. 1990). White's declarations that the Bureau never notified him or his corporation, orally or in writing, of the scheduled tax sale, and that the Bureau failed to post the property with notice of such sale stands unrebutted. There is no affidavit of posting in the county's records. Such an affidavit is customarily retained by the county. A memorandum in the county's files suggests that some posting may have taken place; however, this is insufficient to prove compliance with the requirement of an affidavit of posting made by a duly authorized official. Further, the memorandum fails to mention the

tax assessment and return of delinquent taxes, the service of notice of tax lien, advertisement of notice of tax lien, posting of notice of tax lien, service of upset tax notice, advertising of upset tax sale, posting of upset tax sale) were made in the name "Coleman." The court agrees with plaintiff that the validity of the tax sale to plaintiff is independent of the tax sale to Coleman; however, the November 1985 tax sale to plaintiff is invalid since the Bureau failed to notify White of the sale.

This court holds that plaintiff has established no valid chain of title and no suppportable claim to one, due to the foregoing defects in the Bureau's tax sale procedures. Whether plaintiff was erroneously assessed and, subsequently, paid taxes on the tax tract is irrelevant. By merely paying taxes on the tax tract, plaintiff cannot establish a title to the property superior to that of the record owner who has also paid all assessed taxes, received no notice

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requirement of publication in two county newspapers and notification of the owner by certified mail. Dauphin County has no other records relating to notice to White by publication, posting, or otherwise.

of the tax sale, and had no opportunity to protect its interests in the property. To hold otherwise would be "an outstanding reproach of our system of justice," since White by such holding would be deprived of its property without due process. Hess, 76 A.2d at 748. It is also irrelevant whether plaintiff may have a valid claim against the County of Dauphin for recovery of the purchase price and the taxes he has paid.

Plaintiff next contends that defendant's challenge of the tax sale, at most, makes the sale voidable, not void. However, this contention is unsupported by case of Northup v. Pennsylvania Game Commission, 458 A.2d 308 (Pa. Commw. Ct. 1983), wherein the court upheld a tax sale where notice was defective. The property at issue in that case was sold at a tax sale in 1941. Although the notice provisions of the statute then in force were not satisfied, the record owners received actual notice several times between 1943 and 1949. Id. at 310. The heirs of the record owner brought suit, challenging the validity of the tax sale, in 1979, over thirty years after receipt of actual notice. Id.

The Northup court recognized that "[d]effects in the notice requirements . . . may render [a] tax sale void, as required by the rule that the notice provisions of a tax sale statute must be strictly construed." Northup, 458 A.2d at 310. In spite of this, the court upheld the validity of the tax sale, because the heirs had "slept on their rights for too long, and . . . waived whatever rights they . . . had in [the] land." Id. The court relied on an 1843 Pennsylvania Supreme Court decision holding that irregularities in a tax sale could be waived by the record owners. Id. (citing Bunting v. Young, 5 Watts & Serg. 188 (1843)).

Northup is distinguishable because the defendant in that case, failed to contest the validity of the tax deed over thirty years; whereas, White and the Government, in this litigation, have vigorously contested the validity of plaintiff's tax deed upon becoming aware of plaintiff's title chain. In any case, however, this court would be reluctant to follow the Northup decision. The reasoning in that case is faulty and even incongruous -- initially suggesting that the tax deed is void and then concluding to uphold it. Furthermore, reliance

BEST AVA

by the Northup court on Bunting is misplaced. That decision in Bunting is contrary to Hess and its progeny, as well as the constitutional provisions that are the foundation for the decision in Hess. Available records demonstrate that both the Coleman deed and plaintiff's deed are void as a matter of Pennsylvania law. Ali v. Montgomery Co. Tax Claim Bureau, 557 A.2d 35, 37 (Pa. Commw. Ct. 1989). Accordingly, this court finds that plaintiff's tax sale deed is invalid or void, not voidable, under the Pennsylvania Tax Sale Law.

Finally, plaintiff attempts to place the tax sale within the category of a "judicial" sale, because of the six-month state statute of limitations that applies to attacks upon the validity of such sales. Plaintiff asserts that any attack upon the validity of the tax sale to him, which was certified by the court of common pleas, was completely barred after either July 27, 1986, six months after the confirmation of the tax sale, or August 4, 1986 six months after the date of the tax deed. However, under Pennsylvania law, as well as under most if not all other state laws, a "tax sale" is distinct from a "judicial sale." Judicial

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sales commonly occur as a result of process executions, mortgage foreclosures, petitions for sale for division, or estate sales. A judicial sale is one "which must be based upon an order or a decree [of court] directing the sale." In re Acchione, 227 A.2d 816, 823 (Pa. 1967). Judicial sales are distinct from judicial assent to a sale because of a statutory requirement for that assent, such as the requirements of the Pennsylvania Tax Sale Law. Id. A tax sale is not directed by court order after an evidentiary proceeding before a court. In short, the Pennsylvania court's confirmation or certification of the tax sale to plaintiff was merely that court's assent to the sale, because of the statutory requirements of the Pennsylvania Real Estate Tax Sale Law.[9]

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[9]The Tax Saw Law, itself, recognizes a difference between a tax sale and a judicial sale. In 1986, by the Act of July 3, 1986, P.L. 351, No. 81, § 33, PA. STAT. ANN. tit. 72, § 5860.610 , a new sub-article was added to the Real Estate Tax Sale Law, identified as "(b) Judicial Sale." The ensuing sections provide a separate and distinct procedure for the sale of property where there were no bids at the tax sale. The provisions provide for a rule to show cause; service of the rule, a hearing, and an order for a judicial sale. The sale in this case was not pursuant to the judicial sale provisions of the Real Estate Tax Sale Law, but was a sale by the Tax Claim Bureau pursuant to the provisions

Accordingly, the court finds that, under Pennsylvania law, the tax sale to plaintiff was not a judicial sale with respect to which a six-month statute of limitations could apply.[10]

CONCLUSION

For the foregoing reasons, the court finds that plaintiff's tax deed is void under applicable Pennsylvania law and that plaintiff, notwithstanding its tax deed, has no valid title, much less a superior title, to the property. Therefore, it follows that on the record before this court, plaintiff has failed to establish that it has a legally valid and protected property interest in the condemned tax tract which would entitle him to compensation under the Fifth Amendment to the Constitution. Accordingly, plaintiff's complaint

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governing its sales, beginning in § 601. Act of July 7, 1947, P.L. 1386, Art. VI, § 601, et seq., as amended, PA. STAT. ANN. tit. 72, §§ 5860.601 et seq.

[10]Even if the sale to plaintiff is properly classed as a "judicial sale," the six-month requirement would likely violate due process requirements.

seeking recovery of a portion of the proceeds from the Government's condemnation must fail.[11]

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[11]Defendant's brief characterizes plaintiff's arguments as "metaphysical," "tortuous," "incredible," "without a colorable basis in law," and "frivolous." Such characterizations are unnecessary and actually detract from defendant's case. Moreover, the court cannot agree with the import of these characterizations because plaintiff's position has some, albeit weak, legal precedent to support it. Also, defendant argues as follows:

> [P]laintiff has not shown this court, with case or other authority, that a six-month statute of limitations in Pennsylvania prevents White or the United States from protecting their interests in this court. That is because there is no such authority. Plainly, White and federal defendant may protect their interests in this court by demonstrating that plaintiff does not have a property right to the tax tract. Had plaintiff consulted 28 U.S.C. § 2501, he also would have learned that the statute of limitations in this court is six years, not six months.

Federal Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 7 (second emphasis added).

Thus, if the court understands defendant's argument, defendant has erroneously concluded that a federal statute is the appropriate statute of limitations for contesting a tax sale effected under the Tax Sale Law of Pennsylvania. This argument is surprising, since it fails to grasp the very basic distinction between state and federal law. The true

Defendant's Motion for Summary Judgment is granted and plaintiff's Cross Motion for Summary Judgment is denied. The Clerk is directed to dismiss the complaint, as well as third-party complaints against J. Nevin White Lumber Company and Chicago Title Insurance Company of Maryland, with prejudice. No costs.

/s/ Wilkes C. Robinson
WILKES C. ROBINSON, Judge

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ownership of the tax tract is a matter of state, not federal, law.

One final observation should be made. Although the court finds that, under Pennsylvania law, the tax deed to plaintiff is void, the Court of Federal Claims is without authority to direct the Court of Common Pleas of Dauphin County to set aside the tax sale and void plaintiff's tax deed. Therefore, an action by defendant to set aside the tax sale, might have merit because it could prevent future litigation over title to the tax tract in a Pennsylvania court.

3. Texts of §308(a) of the Pennsylvania Statute
(a) Section 308(a) of the Pennsylvania Act of July 7, 1947, P.L. 1368 Act III, (as originally enacted).

Section 308. Notice of Filing of Returns and Entry of Claim. --

(a) Not later than the thirtieth day of June of each year, the bureau shall give notice of the return of said taxes and the entry of such claim to each delinquent taxable, by United States registered mail, return receipt requested, postage prepaid, addressed to the owner at his last known post office address. If no post office address of the owner is known, or if a notice mailed to an owner at such last known post office address is not delivered to him by the postal authorities, then notice, as herein provided, shall immediately be posted on the property affected. Each "mailed and posted notice shall, (1) show all the information shown on the claim entered, (2) state that if payment of the amount due the several taxing districts for said taxes is not made to the county treasurer on or before the thirty-first of December next following, or no exceptions thereto filed, the said claim shall become absolute, (3) state that on July first of the

year in which such notice is given the one (1) year period of redemption shall commence to run, and that if redemption is not made during that period as provided by this set, the property shall be sold at judicial sale and there shall be no further redemption after such sale.*

*"mail," is original.

3.(b). Section 308(a) as amended by the Pennsylvania Act of August 26, 1965, P.L. 386, No. 201, §1.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Subsection (a) of section 308, set of July 7, 1947 (P.L. 1368), known as the "Real Estate Tax Sale Law," amended August 4, 1961 (P.L. 930), September 15, 1961 (P.L. 1334), and September 23, 1961 (P.L. 1609), is amended to read:

Section 308. Notice of Filing of Returns and Entry of Claim. -- (a) Not later than the thirty-first day of July of each year, or for the first year a county operates under this act, not later than the thirty-first day of October, or whenever, heretofore, any claims have been returned to and a claim entered with the tax claim bureau and the same has not been pursued to sale as provided for by the act of Assembly, then within six (6) months after the effective date of this act, the bureau shall give notice of the return of said taxes and the entry of such claim to each delinquent taxable, by United States registered mail or United States certified mail, return receipt requested, postage prepaid, addressed to the owner personally at his

last known post office address. If the owner of the property is unknown and has been unknown for a period of not less than ten years, such notice shall be given only by posting on the property affected. In the case of a mobilehome or house trailer subject to real property tax, a copy of such notice shall at the same time and in like manner be sent to the encumbrance holders of record. If no post office address of the owner is known or if a notice mailed to an owner at such last known post office address is not delivered to him by the postal authorities, then notice as herein provided shall immediately be posted on the property affected. Each mailed and posted notice shall, (1) show all the information shown on the claim entered, (2) state that if payment of the amount due the several taxing districts for said taxes is not made to the bureau on or before the thirty-first day of December next following, in cases where the notice was mailed prior to August first, or that if payment is not made on or before March thirty-first <u>of the following year,</u> in cases where the notice was mailed on or after August first, or no exceptions thereto filed, the said claim shall become absolute, (3)

state that on July first of the year in which such notice is given or if the notice was mailed after July thirty-first, that on the first day of the month (naming it) in which the notice was mailed the one (1) year period of redemption shall commence or has commenced to run, and that if redemption is not made during that period as provided by this act, the property shall be sold at judicial sale and there shall be no further redemption after such sale.

3.(c). Section 308(a) as amended by the Pennsylvania Act of July 10, 1980, P.L. 417, No. 98, §3.

Section 3. Section 308 of the act, amended September 15, 1961 (P.L. 1334, No. 589) and August 26, 1965 (P.L. 386, No. 201), is amended to read:

Section 308. Notice of Filing of Returns and Entry of Claim. -- (a) Not later than the thirty-first day of July of each year, or for the first year a county operates under this act, not later than the thirty-first day of October, or whenever, heretofore, any claims have been returned to and a claim entered with the tax claim bureau and the same has not been pursued to sale as provided for by the act of Assembly, then within six (6) months after the effective date of this act, the bureau shall give notice of the return of said taxes and the entry of such claim to each delinquent taxable, by United States registered mail or United States certified mail, return receipt requested, postage prepaid, addressed to the owner personally at his last known post office address. If the owner of the property is unknown and has been unknown for a period of not less than ten years, such notice shall be given only by posting on the property affected.

[In the case of a mobilehome or house trailer subject to real property tax, a copy of such notice shall at the same time and in like manner be sent to the encumbrance holders of record.] If no post office address of the owner is known or if a notice mailed to an owner at such last known post office address is not delivered to him by the postal authorities, then notice has herein provided shall immediately be posted on the property affected. Each mailed and posted notice shall, (1) show all the information shown on the claim entered, (2) state that if payment of the amount due the several taxing districts for said taxes is not made to the bureau on or before the thirty-first day of December next following, in cases where the notice was mailed prior to August first, or that if payment is not made on or before March thirty-first of the following year, in cases where the notice was mailed on or after August first, or no exceptions thereto filed, the said claim shall become absolute, (3) state that on July first of the year in which such notice is given or if the notice was mailed after July thirty-first, that on the first day of the month (naming it) in which the notice was mailed the

one (1) year period of redemption shall commence or has commenced to run, and that if redemption is not made during that period as provided by this act, the property shall be sold [at judicial sale] pursuant to the provisions of this act and there shall be no further redemption after such sale.

(2)

Supreme Court, U.S.
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NO. 93 - 1375

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALAN GOLDSTEIN, PETITIONER

v.

THE UNITED STATES, DEFENDANT
and J. NEVIN WHITE LUMBER COMPANY
and CHICAGO TITLE INSURANCE COMPANY
OF MARYLAND,
THIRD PARTY DEFENDANTS, RESPONDENTS

BRIEF IN OPPOSITION

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19 pp

QUESTION PRESENTED FOR REVIEW

Whether a person whose tax deed to land was purchased at a tax sale without notice to the owner of the land is entitled to a portion of the damages in condemnation paid to the owner?

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BRIEF IN OPPOSITION

OPINIONS BELOW

The judgment order and opinion of the court of appeals are unpublished but are set forth in the petition. (Pet.App.11-13). The judgment and opinion of the United States Court of Claims are unpublished but are set forth in the petition. (Pet.App. 14-35).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 10, 1993. (Pet.App. 11) The petition for a writ of certiorari was filed on January 26, 1994, but was rejected by the Clerk due to lack of conformity with this Court's rules. The petition was refiled with the Court on March 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth Amendment to the United States Constitution which provides, in relevant part:

> . . . nor shall private property be taken for public use without just compensation.

U.S. Const. Amend. V

The case also involves The Pennsylvania Real Estate Tax Sales Law, Pa. Stat. Ann. tit. 72, §5860.602(e)(1), which provides:

> (e) In addition to such publications, similar notice of the sale shall also be given by the bureau as follows: (1) at least thirty (30) days before the date of the sale, by United States certified mail, restricted delivery, return receipt requested, postage pre-

paid, to each owner as defined in this act.

Pa. Stat. Ann. tit.72, §5860.602(e)(1).

STATEMENT OF THE CASE

On June 20, 1986, the United States, in its acquisition of land for the Appalachian Trail, condemned 583.59 acres of land belonging to the J. Nevin White Lumber Company ("White")[1] in Dauphin County, Pennsylvania, ("the condemned land"). Included in the condemned land was a 141.686 acre tract of land in which the petitioner claims he has an ownership interest (the "disputed tract"). The petitioner claims that part of the compensation paid to White should have been paid to him.

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[1] J. Nevin White Lumber Company has no parent or subsidiary corporations.

White acquired the disputed tract in 1967 and is able to trace its chain of title back to Thomas Elder, who had conveyed his interest in the disputed tract in 1854.[2]

The petitioner claims his title to the disputed tract had its source in two tax sales conducted by Dauphin County, Pennsylvania taxing authorities in 1964 and 1985.

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[2] Thomas Elder conveyed title in 1854 to Lewis Heck. The Estate of Lewis Heck was partitioned and the premises awarded to his daughter Marianne H. Donaldson. In 1896, Donaldson conveyed the premises to J. Lewis Heck. In 1904, J. Lewis Heck conveyed the Tract to John Creswell, who conveyed the property to Harvey Creswell in 1906. In 1907, Harvey Creswell conveyed the property to Cora Zimmerman, and Zimmerman conveyed the property to Fay Bailey in 1916. In 1938, Bailey conveyed the tract to G. L. Bendigo, who conveyed it to W. L. Gaugler in 1947. In 1952, Gaugler conveyed the property to P. W. Fetterhoff, and Fetterhoff conveyed the tract to Fred N. Lyons by deed dated January 21, 1965. By deed Dated February 15, 1967, Lyons conveyed the tract to White.

For some inexplicable reason, the real estate tax records of Dauphin County indicated in 1964 that Thomas Elder was still the owner of the disputed tract, and that the real estate taxes payable on the disputed tract were delinquent.[3]

As a result of these administrative errors, in 1964 the Tax Claim Bureau of Dauphin County caused the disputed tract to be sold at a tax sale held pursuant to the Pennsylvania Real Estate Tax Sale Law, Pa. Stat. Ann. tit. 72, §5860.101 et seq. Notice of the 1964 tax sale was not given to the then-owner of the disputed tract, Fetterhoff, as required by the Real Estate Tax Sale Law, Pa. Stat. Ann. tit. 72, §5860.602. The Tax Claim Bureau apparently attempted to

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[3] As indicated in the preceding footnote, in 1964 the disputed tract was actually owned by one Fetterhoff, and the taxes billed to Fetterhoff were paid when due.

give notice to the long-deceased Thomas Elder, who had conveyed the disputed tract more than one hundred years before. At the 1964 tax sale a party named Coleman purchased the disputed tract.

Apparently, between 1964 and 1984 both Coleman and the true owner of the disputed tract paid real estate taxes on the disputed tract. However, eventually Coleman failed to pay the taxes billed to him for the disputed tract and the property was again sold at a tax sale conducted by the Tax Claim Bureau of Dauphin County in 1985. This time the petitioner purchased the disputed tract for $170.91. Once again, however, the Tax Claim Bureau of Dauphin County failed to give the statutory notice to the true owner

of the disputed tract, White.[4]

White had no reason to believe its property was being exposed to a tax sale because it had paid all of the taxes which had been billed to it. Further, during the entire period of White's ownership of the disputed tract, no other party attempted to take possession of the property.

On cross motions for summary judgment, the United States Claims Court found that the tax sales to Coleman and the petitioner were void under Pennsylvania law for failure

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[4]. Fetterhoff conveyed the disputed tract to Lyons in 1965 who, in turn, conveyed the disputed tract to White in 1967. The petitioner has not claimed sole ownership of the disputed tract, but says that he owns an undivided one-third interest along with White and a third party named Johnston. According to the petitioner, the disputed tract was assessed for taxes under three separate tax parcel numbers due to administrative error.

to comply with the notice-to-owner provisions of the Pennsylvania Real Estate Tax Law. As a result, the petitioner had no property interest in the disputed tract and was not entitled to a portion of the condemnation award. On appeal, the Court of Appeals for the Federal Circuit affirmed.

SUMMARY OF ARGUMENT

There are no significant constitutional or statutory issues raised in this case which warrant consideration by this Court. The petitioner's claim is premised on his supposed ownership of a tract of land in Dauphin County, Pennsylvania, which he allegedly purchased at a tax sale. The trial court correctly held that the petitioner's tax deed was void because the tax sale was held without notice to the respondent, the true owner of the land. Consequently, the

petitioner had no property interest that entitled him to a portion of the condemnation proceeds.

ARGUMENT

There are no special or important reasons for this Court to grant a writ of certiorari to hear this case. The petitioner's claimed title to the disputed tract has been held void because he purchased the property at a tax sale conducted under procedures that have been held fatally defective under the Pennsylvania Real Estate Tax Sale Law.

This case involves a decision of a court of appeals applying Pennsylvania law which is not in conflict with a decision of another United States Court of Appeals on the same matter. This case does not otherwise call for the exercise of this Court's power of supervision.

The petitioner has presented no evidence of a defect in the title to the disputed tract held by White, which is able to trace its chain of title back to 1854. Instead, the petitioner has argued throughout this case that he has acquired a right to a portion of the disputed tract from an independent source, a tax sale instituted in 1964 which, because of an administrative error by the Dauphin County Tax Claim Bureau, purported to include a portion of White's property in the sale. The petitioner claims that he acquired the disputed tract when it was resold in 1985 at yet another tax sale.[5]

The petitioner admits that the 1964 tax sale was defective for failure to give notice to the actual owner of the property at

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[5] The tax deed was issued to the petitioner on February 4, 1986.

the time, as required by the Pennsylvania Real Estate Tax Sale Law, Pa. Stat. Ann. tit. 72, §5860.602(e)(1). He also concedes that no notice of the 1985 sale was given to White, the owner of the property in 1985, again in violation of the statute. Even though the sales were fatally defective for lack of proper notice, the petitioner claims it was incumbent on the successor to the owner of the property sold in 1964 to bring an action to set aside that sale.

The thrust of his argument is that the 1964 sale constituted a "judicial sale" under Pennsylvania law, and a statute of limitations enacted in 1982 relating to judicial sales effectively bars White from challenging the sale.

The petitioner's argument that the statute of limitations should be applied is

premised on his earlier argument (rejected by the trial court) that a defective tax sale is voidable, not void. The trial court carefully reviewed the Pennsylvania law relating to tax sales and correctly concluded that sales where all of the notice requirements were not observed are void, not voidable. See, e.g., Ali v. Montgomery County Tax Claim Bureau, 124 Pa. Commw. 557, 557 A.2d 35 (1989).

In fact, Pennsylvania has held that even if there were no statutory notice provisions, due process requirements would require notice "such as would likely inform the taxpayer of the intended sale of the premises." In Re: Upset Tax Sale, 147 Pa. Commw. 52, 606 A.2d 1255 (1992); Lapp v. County of Chester, 67 Pa. Commw. 86, 445 A.2d 1356 (1982). Pennsylvania law is understandably devoid of any authority which

would require a property owner to institute an action to set aside a sale of which he had no notice in response to a new statute of limitations which was enacted some 18 years after the alleged tax sale.

Further, the Pennsylvania Real Estate Tax Sale Law recognizes a difference between a "tax sale" and a "judicial sale." While earlier provisions of the Tax Sale Law referred to "judicial sales" in establishing the procedures for the selling of properties of delinquent tax payers, the legislature corrected this misleading language by an amendment to the Tax Sale Law in 1980.[6]

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[6] It is pertinent to note at this point that the sale to the petitioner in 1985 occurred after the language on which the petitioner rests his case was excised from the Real Estate Tax Sale Law and consequently no claim can be made that a statute of limitations is applicable to contesting the second sale.

The petitioner illogically argues that the sale in 1964 was a judicial sale even though the Pennsylvania courts have never given upset sales that characterization and even though the Pennsylvania General Assembly removed this language from the Real Estate Tax Sale Law in 1980.

The petitioner's claim that he was entitled to share a portion of the condemnation award required that he establish that he has a recognized property interest within the meaning of the Fifth Amendment. Since, under Pennsylvania law, petitioner's tax deed was void, he was unable to establish that he had a valid property interest that would entitle him to compensation under the Fifth Amendment. Accordingly, the trial court property dismissed the petitioner's complaint, and the affirmation of the Court

of Appeals was correct both in law and in fact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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